

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Fones4All Corp. Petition for Expedited)
Forbearance Under 47 U.S.C. § 160(c) and Section)
1.53 from Application of Rule 51.319(d) to) WC Docket No. 05-261
Competitive Local Exchange Carriers Using)
Unbundled Local Switching to Provide Single Line)
Residential Service to End Users Eligible for State)
or Federal Lifeline Service)

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 2006

Released: September 29, 2006

By the Commission: Commissioners Copps and Adelstein concurring and issuing separate statements;
Commissioner McDowell not participating.

I. INTRODUCTION

1. In this Order, we deny a petition filed by Fones4All Corporation (Fones4All or Petitioner) requesting that the Commission expand incumbent local exchange carriers' (LECs) unbundling obligations by forbearing from specific aspects of the Commission's unbundling rules under section 251(d)(2) of the Communications Act of 1934, as amended (the Act).¹ Specifically, Petitioner requests forbearance from the application of section 51.319(d) of the Commission's rules to requesting carriers serving particular customers.² For the reasons set forth below, we find that the request is improper and inconsistent with section 10 of the Act, and we therefore deny Fones4All's petition.³

¹ 47 U.S.C. § 251(d)(2). Fones4All filed its petition on July 1, 2005. Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service, WC Docket No. 05-261 (filed July 1, 2005) (Fones4All Forbearance Petition). On August 15, 2005, the Commission released a Public Notice establishing a pleading cycle for comments on the Fones4All Forbearance Petition. *Pleading Cycle Established for Comments on Petition for Forbearance of Fones4All Corp. Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 05-261, Public Notice, DA 05-2288 (rel. Aug. 15, 2005). The Appendix contains the list of parties filing comments in this proceeding.

² 47 C.F.R. § 51.319(d). The Commission adopted these mass market local circuit switching rules as part of the *Triennial Review Remand Order*. *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2005) (*Triennial Review Remand Order*), *aff'd*, *Covad Communications Co. v. Federal Communications Commission*, 450 F.3d 528 (D.C. Cir. 2006) (*Covad v. FCC*).

³ 47 U.S.C. § 160.

II. BACKGROUND

2. Congress passed section 251 of the Act as one of the cornerstone provisions to stimulate the opening of telecommunications markets. Section 251(c)(3) imposes upon incumbent LECs “the duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis.”⁴ In directing the Commission to determine which network elements must be unbundled, section 251(d)(2) states that the Commission must “consider, at a minimum, whether [failing] to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”⁵ On February 4, 2005, the Commission released the *Triennial Review Remand Order* and issued rules concerning the unbundled network elements (UNEs) that incumbent LECs must provide to other carriers. The Commission clarified and modified its impairment framework in several respects, pursuant to section 251(d)(2)(B) of the Act, including drawing reasonable inferences about the prospects for competition in one geographic market from the state of competition in other, similar markets.⁶ In making such inferences for mass market local circuit switching, the Commission found that competitive LECs have deployed a significant and growing number of their own switches, often using newer, more efficient technology. These switches can be used to serve the mass market in many areas, and similar deployment is possible in other geographic markets.⁷ For all of these reasons, the Commission concluded that a section 251 unbundling obligation was no longer appropriate for mass market local circuit switching. The *Triennial Review Remand Order* adopted the rule effectuating this finding, as well as a 12-month transition period for competing LECs to convert their customers from unbundled circuit switching to alternative arrangements.⁸

⁴ 47 U.S.C. § 251(c)(3).

⁵ 47 U.S.C. § 251(d)(2)(B).

⁶ See, e.g., *Triennial Review Remand Order*, 20 FCC Rcd at 2546, para. 22 (clarifying the impairment standard and modifying the unbundling framework).

⁷ *Id.* at 2641-42, para. 199. In addition, the Commission found that there had been significant improvements in hot cut processes (the largely manual process by which an incumbent LEC transfers a customer’s loop from its circuit switch to the switch of a competitive LEC, while simultaneously reassigning the customer’s telephone number from the incumbent LEC switch to the competitive LEC switch). *Id.* The Commission found that the concerns expressed in the *Triennial Review Order* about local circuit switching impairment were mitigated by these factors, and that “the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives.” *Triennial Review Remand Order*, 20 FCC Rcd at 2641-42, 2647, paras. 199, 210 (citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 17265-74, 17277, paras. 466-471, 476 (2003) (*Triennial Review Order*), corrected by Errata, 18 FCC Rcd 19020 (2003), *aff’d in part, vacated and remanded in part*, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004)). Competitive LECs used unbundled local circuit switching in combination with incumbent LEC loops and shared transport in an arrangement known as the unbundled network element platform (UNE-P).

⁸ 47 C.F.R. § 51.319(d)(2)(i) (“An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.”); 47 C.F.R. § 51.319(d)(2)(ii) (“Each requesting telecommunications carrier shall migrate its
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3. On July 1, 2005, Fones4All filed its petition seeking forbearance from application of this rule in certain circumstances.⁹ Specifically, Petitioner asks the Commission “to forbear from applying the rules restricting the availability of ULS [unbundled local circuit switching] in instances where a CLEC requests ULS for the sole purpose of providing, under a state or Federal Lifeline program, service to a single line residential end user.”¹⁰ Fones4All claims that application of the Commission’s rule eliminating access to unbundled local circuit switching “effectively precludes most CLECs from serving Lifeline eligible customers.”¹¹ In particular, Petitioner requests that the Commission “forbear from application of its rules eliminating UNE-P availability for single line residential service.”¹²

4. On June 8, 2006, the Wireline Competition Bureau (Bureau) extended by ninety (90) days, to September 28, 2006, the date by which the Fones4All Forbearance Petition shall be deemed granted in the absence of a Commission decision.¹³ Fones4All filed an application for review of the *Bureau Extension Order* on June 28, 2006.¹⁴

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embedded base of end-user customers off of the unbundled local circuit switching element to an alternative arrangement within 12 months of the effective date of the *Triennial Review Remand Order*.”).

⁹ In addition to its petition for forbearance, on February 24, 2006, Fones4All filed an emergency petition for interim waiver of section 51.319(d) of the Commission’s rules as applied in the state of California pending Commission action on the Fones4All Forbearance Petition. See Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service; Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Fones4All Corp. Emergency Petition for Interim Waiver of Section 51.319(d) of the Commission’s Rules in the State of California, WC Docket Nos. 05-261, 04-313, CC Docket No. 01-338 (filed February 24, 2006) (Fones4All Emergency Petition). Given our resolution of the Fones4All Forbearance Petition in this Order, the Fones4All Emergency Petition is now moot and therefore is dismissed.

¹⁰ Fones4All Forbearance Petition at 13. The Commission’s Lifeline program provides low-income consumers with discounts off of the monthly cost of telephone service for a single line in their principal residence. See *Lifeline and Link-Up*, WC Docket No. 03-109, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 8302, 8306, paras. 4-5 (2004). Under the Commission’s rules, states also have the authority to establish their own Lifeline programs to provide additional support to low-income consumers and to recognize the unique characteristics of each state. See 47 C.F.R. § 54.409.

¹¹ Fones4All Forbearance Petition at 13.

¹² *Id.* at 1, 4 (citing 47 C.F.R. § 51.319(d)).

¹³ Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service, WC Docket No. 05-261, Order, DA 06-1240 (WCB, rel. June 8, 2006) (*Bureau Extension Order*).

¹⁴ Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service, WC Docket No. 05-261, Application for Review (filed June 28, 2006) (Fones4All Application). On July 13, 2006, Verizon filed an opposition to the Fones4All Application. Opposition of Verizon to Application for Review, WC Docket No. 05-261 (filed July 13, 2006) (Verizon Application Opposition). Fones4All filed a responsive letter on September 5, 2006. Letter from Ross A. Buntrock, Womble Carlyle Sandridge & Rice, Attorney for Fones4All, to Marlene H. Dortch,

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5. For the Commission to grant the forbearance requested by Fones4All, we must determine that the three elements of section 10 of the Act are satisfied. In particular, section 10(a) provides that:

The Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.¹⁵

III. DISCUSSION

6. As a preliminary concern, we deny Fones4All's application for review of the *Bureau Extension Order* pursuant to section 1.115(g) of the Commission's rules and section 5(c)(5) of the Act.¹⁶ Extensions of time do not raise "novel questions of fact, law or policy," as Fones4All asserts, and therefore the Bureau is within its discretion to extend by 90 days the date by which a forbearance petition shall be deemed granted on behalf of the Commission.¹⁷

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Secretary, Federal Communications Commission, WC Docket No. 05-261 (filed Sept. 5, 2006) (Fones4All Sept. 5 *Ex Parte* Letter).

¹⁵ 47 U.S.C. § 160(a). With regard to the public interest determination required by section 10(a)(3), section 10(b) requires the Commission to "consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b). Further, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." *Id.*

¹⁶ 47 C.F.R. § 1.115(g); 47 U.S.C. § 155(c)(5) ("In passing upon applications for review [of orders issued on delegated authority], the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefore.").

¹⁷ Fones4All argues that the Bureau had no authority to issue the *Bureau Extension Order* and that even if it did, it did not adequately explain the rationale for its action. Fones4All Application at 4-5. Fones4All's argument falls short. Section 0.91(m) of the Commission's rules authorizes the Bureau to "[c]arry out the functions of the Commission under the Communications Act of 1934, as amended, except as reserved to the Commission." 47 C.F.R. § 0.91. Section 0.291 of the Commission's rules lists the powers reserved to the Commission and it does *not* reserve the right to grant extensions of time. 47 C.F.R. § 0.291. Extensions of time do not raise "novel questions of fact, law or policy" as Fones4All asserts. Fones4All Application at 4. Rather, the extension of time involves a routine and well-adjudicated procedural question and does not address the substance of the issues raised by the Fones4All Forbearance Petition or any other novel question. See Verizon Application Opposition at 4. Moreover,

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A. General Basis for Denial

7. As an initial matter, we conclude that forbearance from rule 51.319(d) would not give the Petitioner the relief it seeks, and we therefore deny the Petition as procedurally defective. The Fones4All Forbearance Petition seeks to use the section 10 forbearance provision to create new section 251 unbundling obligations -- attempting to revisit, in effect, the *Triennial Review Remand Order*'s section 251 unbundling determinations. The Commission cannot, consistent with the statute as interpreted by the Supreme Court and the Court of Appeals for the D.C. Circuit, expand section 251 unbundling through section 10 forbearance. The result Petitioner seeks is unavailable in this context.¹⁸ Moreover, because the Commission is required to analyze impairment before making a network element available, forbearing from section 51.319(d) of the Commission's rules results in a void rather than an unbundled local circuit switching requirement.

8. Petitioner suggests that under section 251(c)(3), incumbent LECs have a "default obligation" to unbundle, and that section 51.319 of the Commission's rules creates an exception to that default unbundling obligation.¹⁹ Petitioner thus apparently believes that forbearing from this "exception" will expand incumbent LECs' unbundling obligation. Petitioner is incorrect on all counts. First, there is no "default unbundling obligation."²⁰ Rather, sections 251(c)(3) and 251(d)(2) require an *affirmative*

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we also reject Fones4All's contention that the *Order* is insufficient because it fails to use the word "necessary" and to offer any analysis why such an extension is necessary. Fones4All Sept. 5 *Ex Parte* Letter at 2. The Bureau needs only to satisfy the substantive criteria of section 10(c) rather than to quote any particular statutory text from section 160(c), and the *Order* easily meets this threshold. See *Bureau Extension Order* at para. 2 & para. 2 n.3 (explaining that the Fones4All Petition raises significant questions whether forbearance would meet the section 10(a) statutory requirements for the extension, and that another pending forbearance petition raises complex issues similar to those raised in this proceeding). Accordingly, we find that in the circumstances of this proceeding, the Bureau justification for this extension was adequate and that the Fones4All Application is denied.

¹⁸ *USTA II*, 359 F.3d at 579 (explaining that forbearance "obviously comes into play only for requirements that exist").

¹⁹ Fones4All asserts that "it is clear that the 'default obligation' to provide unbundled local switching exists," relying on the requirements of section 271 of the Act and the Commission's retention of the section 251 definition of local circuit switching. Letter from Ross A. Buntrock, Womble Carlyle Sandridge & Rice, Attorney for Fones4All, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-261 at 2 (filed June 9, 2006) (Fones4All June 9 *Ex Parte* Letter) (citing Letter from Dee May, Vice President, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-261 at 1-2 (filed May 30, 2006)).

²⁰ See *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) (*USTA I*) (holding that Congress did not authorize so open-ended a judgment that more unbundling in this area is better); *USTA II*, 359 F.3d at 571-72 (noting that the Commission's impairment rule must take the costs of unbundling into account); see also *CompTel v. FCC*, 309 F.3d 3 (D.C. Cir. 2002). Fones4All argues that the Commission's determination to retain the definition of local circuit switching reflects the existence of a default obligation. Such a reading overlooks other regulatory goals advanced by keeping those rules. Not only did the preservation of the definition of local circuit switching serve the purpose of identifying which element must be made available for the 12-month transition for the embedded base of mass market customers using local circuit switching, but this definition also clearly identifies the network element for which there is no longer any unbundling obligation. See 47 C.F.R. § 51.319(d)(2)(i)-(iii). The Commission also explained that it retained the section 51.319(c) definitions of local circuit switching and associated network elements because they were not challenged in the *Triennial Review Order* proceeding. *Triennial Review Remand Order*, 20 FCC Rcd at 2642, para. 200 n.529. Finally, while we agree that section 271 certainly does require the unbundling of local circuit switching pursuant to that provision, that obligation has no bearing on this proceeding. *Triennial*

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Commission decision to require unbundling. As the Supreme Court explained, “[s]ection 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available, it requires the Commission to determine on a rational basis *which* network elements must be made available” before imposing an unbundling requirement.²¹ Furthermore, that determination *must* include an analysis of whether impairment exists.²² In other words, the impairment analysis must precede unbundling.

9. In key part, Petitioner critically misunderstands the result of a decision to forbear from rule 51.319(d). If we were to forbear from the local circuit switch unbundling prohibition in the suggested situations, for all the reasons explained above, such forbearance would still not result in a Commission decision to require incumbent LECs to unbundle that network element. There would be no analysis of impairment, as required by section 251 of the Act, with regard to carriers serving Lifeline customers; no incumbent LEC obligation to make unbundled local circuit switching available in only those situations; and no rule or Commission decision that would make competing carriers eligible for these UNEs to serve these particular customers. Forbearing from the rule that prohibits local circuit switch unbundling would simply create a vacuum rather than confer any rights upon requesting carriers or obligations upon incumbent LECs.²³ Accordingly, because the relief Petitioner requests would not bring about the rights it seeks and is unavailable through section 10, we find the Petition to be procedurally flawed.

B. Application of the Section 10 Forbearance Criteria

1. Sections 10(a)(1) and (2)

10. The Fones4All Forbearance Petition does not meet either of the first two prongs of the section 10 forbearance test. The fundamental purpose of the Act is “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications

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Review Order, 18 FCC Rcd at 17384-86, paras. 653-59 & n.1990; *see also* *USTA II*, 359 F.3d at 588-90. We thus reject Fones4All’s definitional argument. Fones4All June 9 *Ex Parte* Letter at 2 (citing *Triennial Review Remand Order*, 20 FCC Rcd at 2642, para. 200 n.529).

²¹ *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999); *see* SBC Comments at 2 (“the petition . . . ignores the Supreme Court’s holding that unbundling obligations require an affirmative finding of impairment”); *see also* Verizon Comments at 5.

²² 47 U.S.C. §§ 251(c)(3), 251(d)(2); *see, e.g.,* *USTA I*, 290 F.2d at 425 (concluding that Congress “made ‘impairment’ the touchstone”).

²³ Petitioner misses the mark by relying on the *Qwest Omaha Forbearance Order* to support its argument that no impairment findings are required to grant the relief requested. *See* Fones4All June 9 *Ex Parte* Letter at 3 (citing *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19446-47, para. 63 (2005) (*Qwest Omaha Forbearance Order*)). Unlike the proceeding before us, removing Qwest’s section 251(c)(3) unbundling obligation did not require any affirmative finding and thus, did not leave a void in regulation. In contrast, as noted above, removal of the local circuit switching prohibition does not amount to an obligation on the part of incumbent LECs to provide switching as there is no such obligation today. Further, in removing Qwest’s unbundling obligation, the Commission indicated that while its unbundling analysis did not bind its forbearance review, it was “instructive.” *Id.*

consumers and encourage the rapid deployment of new telecommunications technologies.”²⁴ Section 251 allows the Commission to foster that competition in local markets – facilities-based competition, in particular – thereby increasing consumer benefits through the measured implementation of unbundling requirements. The Commission’s recently completed comprehensive analysis of the competitive impacts of unbundling local circuit switching in the *Triennial Review Remand Order*, and the unbundling decisions reached as a result of that analysis, were calculated to promote reasonable charges for consumers and investment by carriers in new facilities. Enforcement of this regulation is therefore necessary to foster competition and protect consumers. As shown below, that analysis supports our conclusion here that the Fones4All petition does not satisfy the requirements of sections 10(a)(1) and (2) and must be denied.

11. Specifically, we find that Petitioner has not presented any arguments or changed circumstances that would justify modifying the analysis in the *Triennial Review Remand Order*. In the *Triennial Review Remand Order*, the Commission thoroughly analyzed the actual and potential effects on consumers and competitors when it made its impairment finding for mass market local circuit switching. The Commission found, in light of the successful deployment of non-incumbent LEC switches by competing carriers, that it would not require the unbundling of mass market circuit switching “even if some limited impairment might exist in some markets.”²⁵ Further, the Commission explained that continued unbundling of local circuit switches would seriously undermine infrastructure investment and hinder development of genuine, facilities-based competition, as envisioned by the Act.²⁶ Balancing this significant disincentive to investment against the limited number of cases in which requesting carriers may be impaired without access to unbundled switching, the Commission concluded that the costs associated with unbundling mass market local circuit switching outweigh the benefits.²⁷ The resulting rule that incorporates this balance is consistent with the direction provided to the Commission by the court in *USTA II* and was affirmed by the court in *Covad v. FCC*.²⁸ Petitioner presents no changed circumstances

²⁴ Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Preamble to the 1996 Act).

²⁵ *Triennial Review Remand Order*, 20 FCC Rcd at 2646-47, 2652-53, paras. 209, 218; see also *supra* para. 2. The Commission did not ignore “substantial evidence in the record” as Petitioner asserts. Fones4All Forbearance Petition at 2. All of the facts presented to the Commission were carefully weighed in arriving at the determination that competition would be encouraged, and thus consumers would benefit and the public interest would be served, if there was no requirement to unbundle local circuit switching. Indeed, in upholding the Commission’s local circuit switching findings, the court found that competing carriers “failed to offer any explanations or contrary evidence” to refute the record of competitive switch deployment, and they “failed to offer evidence that it is ‘uneconomic’ to serve mass market customers with switches that were originally deployed to serve enterprise customers.” *Covad v. FCC*, 450 F.3d at 547-48. Petitioner does not offer those explanations or that evidence here either.

²⁶ *Triennial Review Remand Order*, 20 FCC Rcd at 2652-53, paras. 218-19.

²⁷ *Id.* at 2653-55, para. 220. The court affirmed these conclusions, finding that “the Commission reasonably concluded that CLECs are not ‘impaired’ without unbundled access to [mass market local circuit switching]” and thus, that “the Commission reasonably eliminated switch unbundling.” *Covad v. FCC*, 450 F.3d at 547-48.

²⁸ *Triennial Review Remand Order*, 20 FCC Rcd at 2655-56, para. 221 (“In reaching the decision not to unbundle mass market switching, we follow the D.C. Circuit’s admonition to promote deployment of competitors’ facilities and to reserve access to UNEs for situations where competitors are providing a real alternative to parts of the incumbent’s network.” (citing *USTA II*, 359 F.3d at 563, 572, 581-82, 584; *USTA I*, 290 F.3d at 424-26)); *Covad v. FCC*, 450 F.3d at 547-48.

that would justify forbearance from this rule or any change to the determinations made in the *Triennial Review Remand Order*.

12. Consistent with this competitive assessment, forbearance from applying rule 51.319(d) is not necessary to ensure that the relevant charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory under section 10(a)(1).²⁹

13. Finally, Fones4All has not provided any indication of how customers have been harmed by Fones4All's departure from the market, if that is indeed the case.³⁰ We do not agree that enforcement of this rule is not necessary for the protection of consumers under section 10(a)(2), as consumers benefit most from the balance between UNE-based competitive entry and facilities investment struck in the Commission's unbundling rule.³¹ Petitioner provides no evidence to refute the analysis in the *Triennial Review Remand Order* of the competitive and consumer benefits of the local circuit switching unbundling rule, and those findings support our conclusion here that the first two prongs of the forbearance test are not met.

2. Section 10(a)(3)

14. We also conclude that granting forbearance in this instance would not be "consistent with the public interest" as required by the Act.³² Because, as discussed, forbearance from rule 51.319(d) would not provide Petitioner the unbundling relief it seeks, Petitioner has not offered any basis to show that granting forbearance is in the public interest. In addition, even if the Commission could require unbundling in this proceeding, Petitioner has not demonstrated how the public's interest is furthered by revisiting the Commission's carefully calibrated approach to unbundling or by evaluating one carrier's particular business strategy. In the *Triennial Review Remand Order*, the Commission adopted a carefully calibrated balancing test under section 251(d)(2)(B) to determine the appropriate amount of unbundling, based on an extensive record of alternative facilities deployment, and the guidance contained in three judicial opinions.³³ With its request for forbearance, and without presenting any new evidence or change in circumstances, Petitioner effectively seeks vacatur of one of the Commission's unbundling determinations that the court specifically affirmed.³⁴ As "proof of the critical need" for forbearance from rule 51.319(d), Petitioner offers only the general claim that it has been compelled to scale back its efforts to seek out new customers along with assertions regarding "the disturbing trend of declining telephone penetration in the U.S."³⁵ Petitioner presents no new evidence regarding how competitive LECs are

²⁹ Fones4All Forbearance Petition at 13-14.

³⁰ Just as many other competitive carriers have already done, Fones4All may still negotiate access to local circuit switching similar to UNE-P through commercial agreements with incumbent LECs and remain in the market. See, e.g., *Triennial Review Remand Order*, 20 FCC Rcd at 2651, para. 215.

³¹ *Id.* at 14-15.

³² 47 U.S.C. § 160(a)(3).

³³ See *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *USTA I*, 290 F.3d at 415; *USTA II*, 359 F.3d 554.

³⁴ See *Covad v. FCC*, 450 F.3d at 547-48.

³⁵ Fones4All Forbearance Petition at 4. Petitioner argues that in order to address universal service mandates and a "downward trend" in telephone penetration, the Commission should exercise its forbearance authority to provide

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constrained without access to unbundled local circuit switching, but instead cites to arguments presented and already carefully assessed by the Commission in the *Triennial Review Remand Order*.³⁶ There, the Commission determined that not only are competitive LECs not impaired in the deployment of local circuit switches, but that it is feasible for competitive LECs to use competitively deployed switches to service mass market customers nationwide.³⁷ For any impairment that may still exist, Petitioner does not address how such impairment outweighs the disincentives to investment posed by the availability of unbundled local circuit switching. Because Petitioner presents no new evidence supporting the need to dismantle the nationwide bar on unbundled local circuit switching, and in light of the careful assessments the Commission has made in implementing this statutory provision, as upheld by the court, we find that the result Petitioner seeks would not be in the public interest.

15. We also find unpersuasive Petitioner's arguments that retaining rule 51.319(d) is contrary to the public's interest because applying it to carriers seeking to provide federal Lifeline service to a single line residential customer runs counter to the Act's universal service goals. According to Fones4All, its proposal is in the public interest because the availability of unbundled local circuit switching would allow requesting carriers to provide competitive alternatives for single-line, Lifeline customers.³⁸ Petitioner explains that its business focus is to provide basic local telephone service to low income end users who qualify for universal service support, that it has relied on UNE-P to serve low income customers, and that the Commission ignored substantial evidence in the *Triennial Review Remand Order* record that UNE-P availability is necessary.³⁹ Although we acknowledge that the object of Petitioner's business plan is a laudable one, namely to serve low-income consumers, this pursuit alone does not justify an affirmative finding of impairment. Again, nothing in the record here provides any basis to reconsider the local circuit switching unbundling decision or to forbear from its application to Petitioner. Similarly, although Petitioner is correct that a goal of the Act is to promote universal service, and universal service is clearly in the public interest, that fact alone does not compel the relief requested here.⁴⁰ We disagree with Fones4All's assertion that the Commission's *TracFone* decision supports its Petition here. *TracFone* did not concern section 251(c)(3) and thus the Commission was not required to confront forbearance from a "no impairment" determination.⁴¹

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unbundled local circuit switching for Lifeline supported customers for a single residential line. Doing so, asserts Petitioner, ensures "that the USF tax remains a positive value proposition." *Id.* at 7.

³⁶ Fones4All Forbearance Petition at 2, 9, 11, 13-14, 15.

³⁷ *Triennial Review Remand Order*, 20 FCC Rcd at 2644, para. 204.

³⁸ Fones4All Forbearance Petition at 13.

³⁹ *Id.* at 2-4.

⁴⁰ See Fones4All Reply at 7, 16-17 (citing *Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket No. 96-45, Order, 20 FCC Rcd 15095, 15100-101, paras. 10, 12 (2005) (*TracFone*)).

⁴¹ *TracFone*, 20 FCC Rcd at 15098-15106, paras. 6-26 (forbearing from section 214(e) of the Act and sections 54.201(d) and 54.201(i) of the Commission's rules).

IV. EFFECTIVE DATE

16. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Thursday, September 28, 2006.⁴² The time for appeal shall run from the release date of this Order.⁴³

V. ORDERING CLAUSES

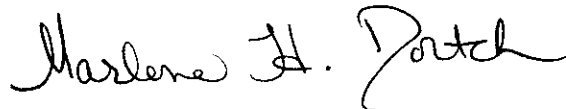
17. Accordingly, IT IS ORDERED, pursuant to section 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 160(c), that the petition for forbearance of Fones4All IS DENIED as set forth herein.

18. IT IS FURTHER ORDERED, pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that the Commission's forbearance decision SHALL BE EFFECTIVE on September 28, 2006. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. §§ 1.4 and 1.13, the time for appeal shall run from the release date of this Order.

19. IT IS FURTHER ORDERED, pursuant to section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that the emergency petition for interim waiver of Fones4All IS DISMISSED AS MOOT as set forth herein.

20. IT IS FURTHER ORDERED, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), that the application for review of Fones4All IS DENIED as set forth herein.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

⁴² 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute); 47 C.F.R. § 1.103(a). We note that on July 3, 2006, Fones4All filed a letter asserting that the Fones4All Forbearance Petition was deemed granted on July 1, 2006 because the Commission had not denied it or extended the statutory deadline for Commission action on the petition. See Letter from Ross A. Buntrock, Womble Carlyle Sandridge & Rice, Attorney for Fones4All, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-261 at 1 (filed July 3, 2006) (Fones4All July 3 *Ex Parte* Letter). The Fones4All July 3 *Ex Parte* Letter does not acknowledge the *Bureau Extension Order* (which extended by ninety days the date by which the Fones4All Forbearance Petition would be deemed granted in the absence of Commission action) or the Fones4All Application (which questioned the legality of the Bureau Extension Order), but apparently assumes that the Fones4All Application was correct and that it was effectively granted when filed. Neither assumption is valid and the Fones4All Forbearance Petition was not deemed granted. See *supra* n.14.

⁴³ 47 C.F.R. §§ 1.4 and 1.13.

APPENDIX**List of Commenters****Comments in WC Docket No. 05-261**

<u>Comments</u>	<u>Abbreviation</u>
BellSouth Corporation	BellSouth
SBC Communications Inc.	SBC
United States Telecom Association	USTelecom
Verizon Telephone Companies	Verizon

Reply Comments in WC Docket No. 05-261

<u>Reply Comments</u>	<u>Abbreviation</u>
CompTel	CompTel
Fones4All Corporation	Fones4All

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, Memorandum Opinion and Order, WC Docket No. 05-261 (Sept. 28, 2006).

This Commission makes its most difficult decisions when two important and conflicted interests must be balanced. In the case before us, the petitioner seeks forbearance from rules that it contends will enable it, and similarly situated communications providers, to offer more affordable telephone service to a wider swath of low income telephone consumers. The record is replete with evidence that such services would be welcome news. According to our own data, the percentage of households that subscribe for telephone service hit its lowest point in 2005 in over fifteen years. The importance of home telephone service is self-evident as consumers, particularly low income consumers, rely heavily on home phones to stay connected with their families, make important calls to employers and doctors, and in an emergency to make that life-saving call. The importance of the services being offered by the petitioner cannot be understated, particularly at a time when the universal service fund's Lifeline/Link-Up program assists only one-third of eligible households.

While allowing a default judgment – a pocket veto of sorts – is possible, it is not the responsible choice here. This is the second time in recent months that we have been faced with a forbearance petition and a Commission that lacks a majority on the issue at hand. On the previous occasion, I observed that failure to act in a forbearance petition is not the way to make sound policy or, in effect, to change current law. I don't believe the process is significantly different here, much as I might find the policy outcome appealing. For these reasons, I am unwilling to permit a default judgment to become new communications law. I therefore concur in this Order, not because the rules in place are of my choosing or my liking, nor because I agree with the analysis in the Order, but because sound policy dictates that rules are to be created or forborne from through reasoned decisions made by this Commission.

**CONCURRING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, Memorandum Opinion and Order, WC Docket No. 05-261 (Sept. 28, 2006).

In this Order, the Commission denies the petitioner's request that we forbear from applying our rules so that the petitioner may use unbundled network elements, specifically the platform of elements known as UNE-P, to serve consumers participating in the Lifeline program. While I believe the Commission can and must do more to promote service to low income consumers, I concur in this Order because I have serious questions about whether allowing a default grant of this forbearance petition is the appropriate means to advance that goal.

Congress made clear in Section 254 of the Act that "consumers in all regions of the Nation, including low-income consumers . . . should have access to telecommunications and information services" and I have repeatedly supported efforts to expand the availability of our Lifeline and Link-Up programs. Access to basic telephone service has long since moved from the category of luxury to necessity, yet there remains much more work to be done. As the Commission recently found, only approximately one third of eligible low income households actually subscribe to the Lifeline program.

I have also consistently supported efforts to encourage the development of competitive choice for consumers and, in this case, I am concerned that the Commission has not done all that it can to encourage providers to serve low income consumers. The prospect of competitive providers that will actively market to Lifeline consumers holds real promise for increasing telephone penetration among low income consumers. Although I do not believe we reach the optimal outcome and I have concerns about the analysis in this Order, I cannot support a default grant of this petition. The petition seeks relief from rules that do not reflect the balance I would have struck, but the public, the industry, and this Commission are far better served when we make decisions through reasoned fact-finding and analysis. As I have stated in the past, Section 10 forbearance is a powerful tool and the Commission must wield this tool responsibly. For these reasons, I concur in this decision.